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DISCUSSION

Yes, redressing past wrongs in the present!

FELIX WÜRKERT — 28 October, 2015

A rejoinder to Maximilian Pichl and Mieke van der Linden

I fully support Mieke van der Linden's thesis that the illegal nature of the colonization in Africa, and indeed everywhere else needs to be recognized. This is one way of redressing past wrongs. Just one way, which is why I have to oppose the notion that it is an alternative to claims for reparation. The one might not even be achievable without the other.

Getting to the recognition of past wrongs

It is true that the recognition of the illegality of colonialism is essential in order to understand the historical origins of public international law. We do not only owe this historical

turn to the work of Martti Koskenniemi, but maybe even more so to the numerous authors associated with the Third World Approach to International Law (TWAIL). They have shown that public international law today still relies on ideas and power structures established within the colonial context.

The fact that the past is still present is a problem for the recognition of the wrongs of colonialism. The way public international law and its historical background are intertwined, the one cannot be changed without the other. Furthermore, the colonial history is still part of the constituting identity of some former colonial states. France for instance passed a law in 2005 that wanted "teachers and textbooks to recognize the positive impact of France abroad, especially in northern Africa." This part of the law has been changed, but it shows just how alive the colonial legacy is. In Germany street names and memorials are still reminiscent of the colonial past. These are just examples and of course they have not gone without contestation. But even with this contestation in mind, it is still hard to believe that former colonial powers will publicly recognize the illegal nature of colonialism. Admitting this would not only fundamentally change their historical identity, but also public international law itself, which until now continues to stabilize the significant influence most of these states have.

In his initial blog post Maximilian Pichl rightly closed by pointing out that Germany's stance on reparations has frequently been a reluctant one. With regard to colonialism this observation can largely be generalized. It can be generalized to apply to all former colonial powers and to the recognition of colonialism as illegal, beyond the mere question of reparations. Therefore this recognition is not

something that will be given voluntarily. It needs to be taken and it needs to be claimed. This claim needs a forum. Court cases, legal action and the scholarly legal debate can provide such fora. Within these fora, the claim for reparation can be a vehicle for a general recognition. That way the subject can be put on the agenda. Dismissing the claim for reparation would mean taking away that vehicle.

Historically "correct" application of law

If I understood her correctly, Mieke van der Linden argued that the law should be applied in its historical context and that the absurd results should motivate normative change. Maximilian Pichl on the other hand understands the historically "correct" application of the law as a perpetuation of past injustice. In support of Maximilian Pichl I would like to argue, that first of all there is no historically "correct" application of the law and that second of all, the legal nature of said "law" in itself is debatable.

The intertemporal application of law is difficult. Do we take the texts and descriptions of customary law and apply them from our 21st century perspective? Do we consider the legal opinions of the time? If so, how can we even interact with all of this, while our language, our knowledge and basically all points of reference and comparison, the whole surrounding that influences the application of law has changed? How for instance do we handle the idea of terra nullius that featured prominently in the colonial discourse? The new Daily Show host Trevor Noah pointed out its absurdity in just three lines (2:30):

British colonialist freshly ashore: "Pah-pa-rah. We have discovered this land!"

African: "Hey, hey!"

British colonialist: "We have discovered people!"

Knowing that there were in fact nations, tribes, states and other forms of organized society, how should our minds then be able to apply the idea of terra nullius in the same way as scholars of the time, who actually ignored these facts? I would compare the historically "correct" application to the reenactment of civil war battles in the US. They might be well prepared and look like the real thing, because everyone involved is dressed up, but while they are performing everyone still knows that afterwards, they will go home in their air-conditioned cars. History is only authentic when it happens.

Legal subjectivity as a colonial instrument

The legal reenactment leaves room for the debate about the "correct" application. But what is there to apply? Mieke van der Linden as well as some of the authors cited by Maximilian Pichl argue that no rights were breached as Herero and Nama in Namibia were no subjects under public international law. Well of course they weren't! Otherwise they would have been states and that would have meant bye-bye terra nullius and bye-bye colonialism. As Maximilian Pichl stressed, the colonial powers had simply decided by treaty in 1885 that this was not the case. To that Radbruch is quite easily applicable. "Where justice is not even strived for, where equality [!], which is the core of justice, is renounced in the process of legislation, there a statute is not just 'erroneous law', in fact is not of legal nature at all. That is because law, also positive law, cannot be defined otherwise as a rule, that is precisely intended to serve justice."

The problem is that public international law of the time did not accommodate the way non-European/non-western societies were organized. As we have seen, they did so, because they chose to, just as they chose to accommodate the Holy See, despite it not being a state. The source of colonial injustice lies in this non-recognition of organized indigenous societies as equal subjects under public international law. So, of course, the staunch application of a state-centred public international law cannot help to redress this injustice. The fact that the Herero People's Reparation Corporation initially intended to sue Germany in the ICJ can either be seen as an implied critique of a concept of statehood that did not accommodate the Herero nation, or as a critique of a public international law that only accommodates states. But regardless of the interpretation, barring the way for reparation claims by referring to the lack of subjectivity of Herero and Nama, leaves no room to acknowledge the illegal nature of colonialism in general. The argument continues the colonial legacy.

Accommodation is possible

International law has come a long way in accommodating non- and sub-state actors. Of course, fitting them into the colonial system of public international law that explicitly did not want to incorporate them is not without difficulties. Maximilian Pichl has shown, however, that even the Berlin West-Africa Convention includes "the preservation of the native tribes" as an obligation in Art. 6. Even if not originally intended this way, who if not the indigenous societies should be the beneficiaries of such an obligation as subjects under international law? Deducing a right from this obligation would be one way of applying the law of the time, without continuing the racist and inegalitarian ideology it was based

upon. Consequently, the Herero have a right to claim reparations. And if we no longer have to look for a state to make that claim, then there should also be no problem in identifying the claimant. Despite the German genocide Herero and Nama still exist as tribes and nations. They are the legitimate claimants. And the responsible party? The Federal Republic of Germany as a state that is identical with the German Reich admitted its responsibility. So how about paying up?

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This text is a rejoinder to Maximilian Pichl and Mieke van der Linden.

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